

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-4005

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL BUSINESS MACHINES CORPORATION,
et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

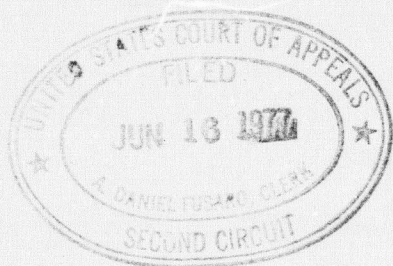
Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
et al.,

Intervenors.

On Petitions For Review Of An Order
Of The Federal Communications Commission

REPLY BRIEF FOR PETITIONER COMPUTER AND BUSINESS
EQUIPMENT MANUFACTURERS ASSOCIATION



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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
INTRODUCTION	1
ARGUMENT	4
I. The Commission's Disposition of CBEMA's Request for Rejection of the Dataspeed 40/4 Tariff was neither Legally Correct nor Adequately Explained.	4
A. None of the Arguments by the FCC or AT&T Provide Adequate Support for the Commission's Failure to Reject the AT&T Tariff Below	4
B. The Basis for The Commission's Denial of CBEMA's Section 61.38 Rejection Arguments Remains Unexplained	14
II. The Commission's Failure to have Addressed CBEMA's Alternative Requests for Relief, and its Refusal to Consider CBEMA's Sub- stantive Arguments Concerning Cross-Subsidy, Remain Unexcused	19
A. The Commission's Failure to Address CBEMA's Requests for Alternative Relief was Arbitrary and Capricious.	19
B. The Commission's Refusal to Resolve the Material and Substantial Issue of Cross- Subsidy was Clear Abuse of Discretion . .	26
III. The Asserted Availability of Further Complaint Procedures neither Excuses Commission Failures Below nor Represents Effective Relief For the Parties Affected	29
CONCLUSION	34

TABLE OF AUTHORITIES

Court Decisions:

	Page
Accardi v. Shaughnessy, 347 U.S. 260 (1954).....	21
American Farm Lines v. Black Ball Freight Co., 397 U.S. 532 (1970).....	5,6
American Tel. & Tel. Co. v. FCC, 503 F.2d 612 (2d Cir. 1974).....	4
American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir. 1973).....	5
Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963).....	23
Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971).....	6,7
Atlantic Seaboard Co. v. FPC, 201 F.2d 568 (4th Cir. 1953).....	24
Columbia Broadcasting System v. FCC, 454 F.2d 1018 (D.C. Cir. 1971).....	11
Episcopal Theological Seminary v. FPC, 269 F.2d 228 (D.C. Cir. 1959).....	24
Home Box Office, Inc. v. FCC, _____ F.2d _____ (Case No. 75-1208, D.C. Cir. 1977).....	27,28
Long Island R. Co. v. United States, 193 F. Supp. 795 (E.D.N.Y. 1961).....	23
Marine Space Enclosures, Inc. v. Federal Mari- time Comm'n, 420 F.2d 577 (D.C. Cir. 1969)....	24,25
Meadville Master Antenna, Inc. v. FCC, 443 F.2d 282 (3d Cir. 1971).....	24
Naph-Sol Refining Co. v. United States, 269 F. Supp. 530 (W.D. Mich. 1967).....	24
National Air Carrier Ass'n v. CAB, 436 F.2d 185 (D.C. Cir. 1970).....	24
North American Van Lines v. ICC, 386 F. Supp. 665 (N.D. Ind. 1974).....	24,25
Oscar Mayer & Co. v. United States, 268 F. Supp. 977 (D. Wisc. 1967).....	30
Phillips Petroleum Co. v. FPC, 227 F.2d 470 (10th Cir. 1955).....	24
Teamsters Local U. 769 v. NLRB, 532 F.2d 1385 (D.C. Cir. 1976).....	17
Trailways of New England, Inc. v. CAB, 412 F.2d 926 (1st Cir. 1969).....	24
United States v. SCRAP, 412 U.S. 669 (1973).....	23
Yellin v. United States, 374 U.S. 109 (1963)....	21

Administrative Decisions:

Page

Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating to Evidence, 25 F.C.C. 2d 957 (1970), 40 F.C.C. 2d 149 (1973).....	4,15
AT&T, 20 F.C.C. 2d 383 (1969), 21 F.C.C. 2d 1 (1970).....	6,7
AT&T - Telpak, 61 F.C.C. 2d 587.....	9,10
AT&T - WATS, 46 F.C.C. 2d 13, 46 F.C.C. 2d 81 (1972).....	11,12
Brentwood Co., 37 F.C.C. 2d 498 (1972).....	11,12
MCI Telecommunications Corp., 53 F.C.C. 2d 572 (1974).....	11,12

Statutes and Administrative Regulations:

Communications Act of 1934, as amended:	
Section 203, 47 U.S.C. §203.....	3,4
Section 204, 47 U.S.C. §204.....	5
FCC Rules and Regulations:	
Section 61.38, 47 C.F.R. §1.38	4,5,6

Miscellaneous:

Hearing on S. 2054 Before the Senate Committee on Commerce, 94th Cong. 1st Sess. (1975).....	6,7
S. Rep. No. 94-918, 94th Cong., 2d Sess. (1976) ..	6,7

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INTRODUCTION

The issues raised by CBEMA's petition for review in this case run to the heart of the FCC's tariff evaluation processes. And the arguments presented here by the parties fundamentally revolve around the extent to which agency convenience and oversight

may be permitted to erode the public's entitlement to meaningful participation in those processes.

In the Communications Act, Congress has established a regulatory scheme intended, among other things, to balance the interests of carriers and the public. While carriers are given broad latitude to initiate and modify service offerings by the filing of tariffs with the Commission, the public is granted corollary entitlements to be notified of such filings, to be provided sufficient information to understand their basis and scope, and to be heard by the agency where questions of lawfulness appear. For its part, the FCC has a variety of powers and procedural mechanisms to assure a proper accommodation of both interests.

In the proceeding below, the FCC failed entirely to recognize the scope of its tariff-processing obligations. Indeed, the agency's arguments to this court underscore the inappropriately cavalier fashion in which the FCC believes its tariff review processes may be administered. While Congress has mandated a notice period for the public to evaluate proposed tariff offerings, and the Commission has promulgated regulations requiring carriers to furnish explanatory information to implement a meaningful use of that time period, the FCC here contends that both the legislation and the rules are intended principally for its benefit and convenience. The public's role is sufficiently nominal, it is suggested, that the Commission may choose not to enforce its information requiring rules, may deny or choose to ignore requests for relief filed pursuant to its own regulations, and need not explain any

such actions. The Commission further claims that its latitude is so boundless that this court can neither demand an accounting nor entertain remedial action.

The Commission is undoubtedly entitled to reasonable latitude in discharging its regulatory responsibilities. But it may not indulge its decisional convenience in ways which affirmatively impair the public participation intended by Congress. The course of the proceeding below impermissibly disregarded CBEMA's entitlement in that regard. The Commission should not be permitted to shield its arbitrariness behind overreaching claims of absolute discretion or unreviewability.

ARGUMENT

I. THE COMMISSION'S DISPOSITION OF CBEMA'S REQUEST FOR REJECTION OF THE DATASPEED 40/4 TARIFF WAS NEITHER LEGALLY CORRECT NOR ADEQUATELY EXPLAINED.

A. None of the Arguments By the FCC Or AT&T Provide Adequate Support For the Commission's Failure to Reject the AT&T Tariff Below.

In light of certain contentions advanced in the briefs of the FCC and AT&T, discussed below, the nature and intent of Section 61.38 should be borne clearly in mind. The rule is not an oddity or an isolated technical requirement. Rather, it is an integral and important part of an overall tariff-filing-and-review process--one Congressionally structured to permit meaningful public participation. Under Section 203(b) of the Communications Act of 1934 as amended, 47 U.S.C. §203(b), tariffs proposing new carrier services may generally not become effective

until 90 days after their filing with the FCC. As this court has stated, the purpose of the waiting period is "to give the public the opportunity to review the tariff and to make any pertinent comments. It is further intended to provide the FCC time to study the tariff as well as any comments received from the public."

American Tel. & Tel. Co. v. FCC, 503 F. 2d 612, 614 (2d Cir. 1974).^{1/}

The basic intent of the notice period is to assure an opportunity to forestall the institution of unlawful services, or to investigate the propriety of proposed services where questions of lawfulness have been raised, before such services are initiated. To that end, based on public comments received during the statutory notice period, and on its own evaluation, the Commission may reject tariffs for patent unlawfulness, or it may

^{1/} As the Commission stated in initially proposing revisions to its tariff-notice-and-comments procedures in 1970:

The intent of having a requirement that tariff filings will not become effective until after the expiration of a certain period is to afford the public and the Commission sufficient notice of the filing. We reject the concept that notice is intended merely to inform the Commission and the public of a tariff filing. The notice period must by necessity be of sufficient duration so that, among other things, the tariff filing may be examined by the Commission and the public to determine whether the tariff filing meets the requirements of the Commission's rules and the Act and whether the legal remedies of rejection or suspension and designation for hearing should be sought by the public or imposed by the Commission.

Tariffs-Evidence, 25 F.C.C. 2d 957, 970-71 (1970) (emphasis added).

suspend them for up to five months and conduct an investigation of their lawfulness. American Tel. & Tel. Co. v. FCC, 487 F. 2d 865, 871, 880, n. 33 (2d Cir. 1973); 47 U.S.C. §204.

Section 61.38 makes the whole process meaningful. For it is that regulation which requires carriers to file explanatory information on the basis of which the public and the Commission must determine the nature and effect of particular proposals. It is that data to which the public must look in urging any remedial Commission action. And it is on that information the Commission must ultimately base its public interest judgment where questions of lawfulness are raised.

Both the FCC and AT&T briefs attempt to support the Commission's decision on the matter by attributing to the Commission virtually unreviewable discretion in its approach to Section 61.38.^{2/} Citing American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), both parties suggest that Section 61.38 is merely a requirement for the Commission's convenience, and that parties such as CBEMA have no standing to challenge any approach the Commission may take to the Rule's interpretation and enforcement. The decision relied on, however, is no precedent for the propositions advanced. American Farm Lines involved ICC regulations requiring certain specified information to be submitted with

^{2/} See, e.g., AT&T Br. 36: "[U]nder these authorities no basis exists for overturning the Commission's action even if there were some deficiency in the [AT&T Section 61.38] materials."

motor carrier applications for temporary operating authority. The Court deferred to the agency judgment that its rule had been adequately satisfied, and central to the holding was the fact that the statutory provision involved--"a narrow exception to the basic procedural pattern" for carrier authorization, Id. at 543 (Brennan, J., dissenting)--conferred on the ICC the power to grant temporary authorizations "without hearings or other proceedings" when the authority related to a "service for which there is an immediate and urgent need," and where there was "no carrier service capable of meeting such need." 49 U.S.C. §310 (a). It was because of the unique and limited character of the authorization process that the Court found the ICC "entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems." Id. at 538.

Here, of course, Section 61.38 is not an incident to any emergency, temporary authorization process. Rather, it is an integral part of an overall statutory tariff review process--one which reflects a clear Congressional intention, not simply to serve the Commission's convenience, but to preserve as well a meaningful public participation. The Commission does not have unlimited discretion in its use of Section 61.38, and it may not disregard the public's stake in the Rule's enforcement. Its judgments concerning AT&T's compliance with the rule are subject to familiar standards of judicial review. And the application of

those standards here confirms the deficiency of the action below.^{3/}

As explained in CBEMA's initial brief herein (pp. 27-31), CBEMA argued before the Commission that the tariff-supporting information submitted below by AT&T pursuant to Section 61.38 omitted three vital areas of data: (a) it did not disclose or allocate any preservice costs for the Dataspeed 40/4; (b) it did not disclose or explain the cost methodology that was used; and (c) it did not support the conclusory marketing estimates which were given to justify the volume of sales and the revenues expected. (CBEMA Br. 29-30) Without such information, no effective determination could be made whether issues of cross-subsidy were raised which warranted remedial Commission action. To the extent such data was absent, CBEMA argued, AT&T had failed to satisfy Section 61.38.

3/ Associated Press v. FCC, 448 F. 2d 1095 (D.C. Cir. 1971), also cited in the FCC and AT&T briefs, is not to the contrary. The Section 61.38 requirements were not at issue in either of the Commission's rulings which preceded the court's decision. AT&T, 20 F.C.C. 2d 383 (1969), 21 F.C.C. 2d 1 (1970). Moreover, the Commission was considering the lawfulness of the challenged tariff provisions in the context of hearings initiated pursuant to Section 204 of the Act in any event. Finally, to the extent Associated Press may be argued to have created doubts concerning the public's role in the statutory notice requirements and related procedures, those doubts were clearly resolved during the 1976 revisions to the Act when, for example, FCC Chairman Wiley observed that during the notice period "affected consumers must analyze the tariff changes and file comments with the Commission." Hearings on S.2054 Before the Senate Committee on Commerce, 94th Cong., 1st Sess. 6 (1975). See also e.g., S. Rep. NO. 94-918, 94th Cong. 2d Sess. 2 (1976), where it was pointed out that a longer notice period was needed because "[n]either the Commission nor interested parties can be expected to review and analyze [tariff] filings within the constraints of the existing 30-day notice period." (Emphasis added.) And see CBEMA Br. 5-9.

In its decision, the Commission summarily dismissed the point in the following conclusory statement (J.A. 983):

AT&T has substantially complied with the requirements of Section 61.38 and has clearly complied with the specific components thereof in terms of the economic data submitted, justification for the filing, and the basis for the rates selected.

CBEMA has here contended the Commission's conclusion to be in error.

Initially, it should be made clear that the state of the record concerning the three identified areas of information is in fact as CBEMA has related it. For while the FCC brief suggests CBEMA's descriptions to be "misleading and untrue" (FCC Br. 47, n. 41), its quarrel is not so much with the facts (or lack of them) as with their decisional significance. As to preservice costs, for example, the FCC brief agrees "that AT&T did not break down the preservice costs." (Ibid).

However, it contends that "such an undertaking is not a requirement of the rules," that the Commission has never "required such a breakdown at this stage," and that the Commission "generally accepts the delivered cost of equipment to the carrier." (Ibid.) All of those assertions, however, are entirely gratuitous, and there is no record support for the proposition that "delivered cost

of equipment" covers preservice research and development costs.^{4/} More importantly, there is nothing whatever in the decision below that any such factors were the basis for the Commission's judgment below, as distinct from its counsel's intuition on appeal.

With respect to cost methodology, it was shown in CBEMA's brief that the record below contained only AT&T's assertions that all "relevant" costs were covered, with no explanation of whether the "relevant" costs included overhead, marketing and other factors, and if so, how such costs were covered. (CBEMA Br. 30-31). While AT&T merely repeats its summary assertion that all "relevant" costs were covered,^{5/} the FCC states that "AT&T's cost methods were revealed," pointing for support to certain entries labeled "total incremental investment" and "annual incremental costs" in

^{4/} While the Commission's brief refers to one entry in the AT&T Section 61.38 materials as an example of "delivered cost," there is no basis for knowing whether that entry includes an appropriate apportionment of design and research expenditure. The proposition that "delivered cost" or "major material costs" of individual Dataspeed 40/4 items could or do cover the "research and development program" might be valid if design and research normally took place in the manufacturing arms of the Bell System. In fact, most Bell System research takes place in Bell Telephone Laboratories, whose funding comes primarily from AT&T and would not be covered by the equipment prices of the manufacturers Western Electric and Teletype. See, J.A. 605-07.

^{5/} AT&T Brief at 11, n. 21, 34. At these points, AT&T makes the claim that its bare assertion of covering some "relevant" costs obviates any question of cross-subsidy or inadequate support for its rates.

AT&T's cost itemizations. (FCC Br. 47, n. 41).^{6/} Again, however, there is nothing in the record confirming that the cost sheets were intended to explain cost methodology, or that the Commission so viewed them below. And in practical terms, such listings of component elements could not represent a coherent explanation of the Dataspeed 40/4 rates and costs vis-a-vis the marketing and overhead expenditures of AT&T Long Lines Department in any event.

Finally, as to AT&T's marketing judgments and estimates, the FCC brief asserts that "the marketing estimates submitted were supported to the degree accepted for all submissions of this type, including for example Dataspeed 40/3." (Ibid). That conclusion, of course, is wholly gratuitous, and accompanied by nothing to support the intuition concerning "all submissions of this type." Moreover, there is no record support whatever that any "Dataspeed 40/3 materials" were ever looked to, much less relied on, by the Commission during the proceeding under review.

In CBEMA's view, neither the FCC brief nor that of AT&T establish that the record was other than CBEMA has basically described it. To the extent the FCC brief undertakes to downplay the significance of the omissions from AT&T's Section 61.38 materials, those explanations correspond to no words in the decision below. Consequently, such justification efforts are without significance here.

^{6/} If the FCC brief is here attempting to show that AT&T used an incremental cost methodology, it should be noted that the Commission rejected AT&T's incremental approach in Docket No. 18128 and prescribed a new methodology. AT&T - Telpak, 61 F.C.C. 2d 587, 661-62 (1976).

As the court observed in Columbia Broadcasting System, Inc. v. FCC, 454 F. 2d 1018, 1034 (1971):

[I]t is well settled that a reviewing court 'may not accept appellate counsel's post hoc rationalizations for agency action' as a basis for affirmance. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168..... (1962). The decision must stand or fall 'solely [on] the grounds invoked by the [Commission].' S.E.C. v. Chenery Corp., 332 U.S. 194, 196 (1947).

As an overall matter, the FCC's brief never ventures what it views to be the applicable standards for determining compliance with Section 61.38, nor does it attempt to derive and rely on any specific criteria in past Commission rulings. Instead, it is simply argued that the Commission is not required to reject all tariffs which do not comply with its Rules, and that the Commission "has never summarily rejected a tariff on the basis of arguments such as those here lodged by CBEMA." (FCC Br. 43-44.)^{7/} Such contentions, however, do not address the basic question here--whether in fact AT&T's submissions satisfied the Section 61.38 requirements in the circumstances below.

^{7/} In this regard, the FCC brief also disputes CBEMA's claim (CBEMA Br. 29) that, where serious questions have been raised regarding the quality of Section 61.38 materials, the Commission has not simply dismissed the matter without taking some remedial action. (FCC Br. 45) While "many examples" are claimed, the three cited in the FCC's brief are far from persuasive support. In Brentwood Co., 37 F.C.C. 2d 498 (1972), the Commission declined to take action against a carrier where it had failed initially to submit any of the materials called for by Section 61.38. The reason, how-

AT&T correctly points out that Section 61.38 requires "no specific level of detail," but establishes general requirements which must be administered "flexibly" and in light of the Rule's purpose. (AT&T Br. 32-33). Both the FCC and the AT&T briefs agree that the purpose of the Rule is to obtain information sufficient to determine if tariff proposals "present questions of lawfulness which warrant [Commission] investigation and hearing." 40 F.C.C. 2d at 153. (AT&T Br. 31-33:

7/ continued

ever, was because the carrier fell within that portion of Section 61.38 which specifically exempts from compliance carriers with annual gross revenues of less than \$100,000.

In AT&T, 46 F.C.C.2d 13 (1974), the Commission did indeed decline to reject AT&T's WATS tariff revisions for failure to satisfy Section 61.38. What the Commission here omits mentioning, however, is that, one day later, it suspended and ordered an investigation of those tariffs. AT&T, 46 F.C.C.2d 81 (1974). Finally, in MCI Telecommunications Corp., 53 F.C.C.2d 572 (1974) -- involving the tariffs of a specialized competitive carrier, not a monopoly carrier such as AT&T -- the Commission in fact rejected portions of the challenged tariff revisions. Moreover, as to Section 61.38, the Commission at least explained its views on the adequacy of the data submitted by the carrier.

FCC Br. 41.) And the Commission in adopting Section 61.38 emphasized "that it is particularly important to obtain the data required by our rules where questions are raised as to whether a new . . . competitive service is being cross-subsidized by other services" 40 F.C.C. 2d at 153. Given the nature of the issues raised below, and for the reasons set forth in CBEMA's initial brief herein, there was a clear failure by AT&T to satisfy the demands of Section 61.38. The Commission's decision to the contrary, and its failure to have rejected the Dataspeed 40/4 tariff for that reason, were clear error.

B. The Basis For The Commission's Denial
Of CBEMA's Section 61.38 Rejection
Arguments Remains Unexplained.

In its brief, CBEMA argued that the Commission failed adequately to explain why, in the face of CBEMA's arguments, it nonetheless believed AT&T's materials to have satisfied the Section 61.38 requirements. (CBEMA Br. 35-41.) Both the FCC brief (and AT&T point to the Commission's statement that --

AT&T has substantially complied with
the requirements of Section 61.38 and
has clearly complied with the specific
components thereof in terms of the
economic data submitted, justification
for the filing, and the basis for the
rates selected.

(FCC Br. 47; AT&T Br. 35 .) Both assert that CBEMA's cross-subsidy arguments were adequately disposed of by the Commission statement that such matters are "beyond the scope of Section 61.38." (FCC Br. 48; AT&T Br. 35.) And AT&T relies additionally on the

Commission's further assertion that "Section 61.38 has been applied to the Dataspeed 40/4 offering in a manner consistent with previous Commission determinations." (J.A. 983 ; AT&T Br. 35).

With regard to the decision's consistency with "previous Commission determinations," CBEMA has pointed out that the Commission's decision below neither discussed nor specified any. (CBEMA Br. 40-41). Interestingly, the FCC and AT&T briefs part company in guessing what the Commission had in mind. AT&T surmizes (AT&T Br. 35) that the Commission meant cases such as those cited in CBEMA's initial brief, herein, while the Commission's brief opts for a Bureau Chief ruling in November of 1974 concerning Dataspeed 40/3 (FCC Br. 46, n. 39.) Clearly, the briefs on appeal have served only to underscore this deficiency in the decision.

Concerning CBEMA's cross-subsidy "concerns," both the FCC brief and AT&T embrace the Commission's summary dismissal of the matter, arguing that CBEMA had erroneously interpreted Section 61.38 to require sufficient information to permit a final determination of a tariff's lawfulness. (AT&T Br. 32,35 ; FCC Br. 41.) In point of fact, however, CBEMA did not -- and does not here -- contend that Section 61.38 requires complete evidentiary material on the basis of which final judgments must be made concerning cross-subsidy. What CBEMA does contend is that Section 61.38 requires at least that level of information necessary to judge whether the potential for cross-subsidy is sufficiently apparent that further investigation in a hearing context is required. That was the qualitative standard the Commission had applied in the

past. And that was the standard CBEMA argued to be applicable below. While the Commission found such matters to be "beyond the scope of Section 61.38," its enigmatic assertion flies directly in the face of its 1973 statement that "it is particularly important to obtain the data required by [Section 61.38] where questions are raised as to whether a new . . . competitive service is being cross-subsidized by other services." Tariffs-Evidence, supra, 40 F.C.C.2d at 153.

Finally, on the Commission decision's conclusory assertion of AT&T's compliance with the literal terms of Section 61.38, the endorsement of the Commission's brief and that of AT&T are no more particularized than the decision's verbiage. Neither party is able to find any specific disposition of the particular deficiencies CBEMA had urged. Basically, the FCC brief appears to argue that since, in its view, "AT&T filed all of the material listed in the rules," compliance for rejection purposes was perforce established. (FCC Br. 47.) That view, however, assumes that Section 61.38 is simply a rote exercise -- that, so long as pieces of paper bearing an appropriate heading are lodged, the substantive con-

tent of such filings is without consequence. Such an approach certainly belies all of the Commission's stated intentions when Section 61.38 was adopted. Indeed, while it claims "literal compliance with Section 61.38" (AT&T Br. 33), even AT&T does not contend that Section 61.38 is simply a paper-filing exercise. Rather, it recognizes that there is a qualitative standard involved -- one which permits "the Commission to make its 'first cut' in deciding whether or not to investigate." (Ibid). But nowhere in the decision below can one find whether, or on what basis, that "first cut" was made.

Perhaps as significant as what they urge to be adequate Commission explanations are those aspects of the decision below which the FCC and AT&T briefs scrupulously ignore. As CBEMA pointed out (CBEMA Br. 36), the Chief of the Common Carrier Bureau had initially determined the materials submitted by AT&T to be inadequate to satisfy Section 61.38, and had called for the submission of additional information. (J.A. 624,633.) Moreover, in his decision, the Bureau Chief held AT&T to have satisfied Section 61.38, based not simply on the materials initially submitted with the tariff pages, but because "AT&T has submitted additional material at our

request to support statements made in its original filing." (J.A. 650 .)

On review, the Commission noted the Bureau Chief's conclusion, and broadly stated:

We have reviewed the supporting material and agree with the Bureau Chief that no prima facie showing of unlawfulness has been made which would merit rejection.

(J.A. 983 .) Since the time of that statement, however, the Commission has candidly acknowledged that in fact it considered none of the "additional material" submitted to the Bureau by AT&T.

(A - 13,14). To that extent, the Commission was hardly "agreeing" with what the Bureau Chief had specifically stated to be the basis for his judgment. On what, therefore, was the Commission's own position on the matter based? In what respects, and to what degree, did its view of the adequacy of the Section 61.38 materials differ from that of the Bureau Chief? None of these questions are answered by the Commission's decision.^{8/} Even in the Commission's brief, the only attempt to rectify the Commission's dubious claim of "agreement" is the gratuitous intuition that the Bureau Chief "recognized that the 61.38 filing complied with the Commission's rules since 61.38 was never meant to inquire into [cross-subsidy] problems, "and that "[t]he Commission came to the same conclusion regarding the

^{8/} Compare, however, Teamsters Local U. 769 v. NLRB, 532 F.2d 1385, 1392 (D.C. Cir. 1976), where the court observed that while the Board was fully entitled to overrule an Administrative Law Judge's ruling, "the Board at least should . . . articulate its reasons for reversing the ALJ."

adequacy of the 61.38 materials." (FCC Br. 48.) Those, of course, are contentions of counsel, not Commission decisional statements.^{9/}

II. THE COMMISSION'S FAILURE TO HAVE
ADDRESSED CBEMA'S ALTERNATIVE REQUESTS
FOR RELIEF, AND ITS REFUSAL TO CONSIDER
CBEMA'S SUBSTANTIVE ARGUMENTS CONCERNING
CROSS-SUBSIDY, REMAIN UNEXCUSED.

A. The Commission's Failure to Address CBEMA's
Requests For Alternative Relief Was Arbitrary
and Capricious.

In its initial brief herein (pp. 41-43), CBEMA pointed out that, in addition to its asking rejection of the AT&T tariff, it had also posed alternative requests for relief to the Commission. If rejection were deemed inappropriate, CBEMA had urged, the Commission should defer the effective date of the tariffs, and order AT&T to file additional data relating to cross-subsidy necessary to determine what action, if any, should be taken in that regard. (J.A. 411, 618-19.) Alternatively, CBEMA had argued that if neither its first nor second suggested courses of action were pursued, then suspension and investigation of the tariff should be ordered. (J.A. 412, 620 .) CBEMA has shown that, while

^{9/} AT&T attempts to rectify the "agreement" inconsistency by stating that "the Commission itself was fully entitled to regard AT&T's original filing as adequately complying with Section 61.38." (AT&T Br. 35, n. 67.) While AT&T may be correct as a matter of overall concept, it is impossible to know whether in fact the Commission took that approach below. And in fact, what few words appear in the decision -- "[w]e have reviewed the supporting material and agree with the Bureau Chief" -- plainly indicate otherwise.

the Commission's decision purported to deal with the matter of rejection, the decision was completely silent on either of CBEMA's two alternative requests for relief -- deferral of the tariff with a call for more information, or suspension and investigation. (CBEMA Br. 43).

As to the first, both the FCC and the AT&T briefs are silent. While AT&T acknowledges CBEMA's request for deferral (AT&T Br. 10-11), neither party even attempts to identify any portion of the decision below as having dealt with that matter. Significantly, neither contends that the Commission was without adequate authority or discretion to grant such a request. To the contrary. The FCC brief affirmatively points to the Commission's authority to modify or waive the notice period. (FCC Br. 39, n. 26.) The Commission's failure to have addressed this aspect of CBEMA's request for relief is therefore effectively conceded.

What the FCC and AT&T briefs devote extensive discussion to, however, is CBEMA's request below that the Commission suspend and investigate the tariff. Initially, it is important to note what those parties do not dispute in this regard. First, neither contends CBEMA's request to have been procedurally deficient. Second, neither asserts that issues of cross-subsidy are not in fact appropriate bases for Commission suspension and investigation.^{10/}

^{10/} Indeed, the FCC brief specifically acknowledges that "questions of cross-subsidy . . . are matter[s] for the Commission to decide after investigation and hearing." (FCC Br. 46, n. 40.) For its part, AT&T concedes "it is correct that the Commission . . . could . . . have ordered an investigation" concerning the cross-subsidy questions posed by CBEMA. (AT&T Br. 37).

Finally -- and perhaps most importantly -- neither disagrees that the Commission decision below is in fact silent on the matter of suspension.

Rather, what is argued is that CBEMA's contention is without appellate consequence. The court is told that the Commission "decided" not to suspend, that that judgment is one committed entirely to agency discretion, and that the Commission's exercise of that discretion is not subject to judicial review. (AT&T Br. 38-40; FCC Br. 48-49.) Moreover, AT&T adds that "CBEMA's request for review of the Commission's failure to suspend is essentially moot because a suspension can no longer be ordered." (AT&T Br. 37, n. 73.)

The arguments by the FCC and AT&T are wide of the mark. CBEMA does not here contend that the Commission improperly exercised its discretion with respect to suspension of the Dataspeed 40/4 tariff. What CBEMA does contend is that the decision's absolute silence concerning suspension raises fundamental questions whether the Commission ever in fact exercised that discretion. Moreover, assuming arguendo that its silence is tantamount to agency "action," the Commission was not relieved of its obligation to explain the reasons for that action.

The FCC's brief on the subject refers to the Commission's "choice" not to suspend, its having "declined" to suspend, its "decision" not to suspend. (FCC Br. 48-49.) Similarly, AT&T's arguments on the matter repeatedly refer to a "choice" not to suspend, and a "refusal" or "declining" to take such action.

(AT&T Br. 38-40.) Such characterizations, however, assume that the Commission has in fact exercised its discretion, and has reached some informed judgment. And based on that assumption, the parties invoke precedents which purport to insulate such discretionary determinations from judicial scrutiny.

But the pivotal assumption is wholly unsupported. For there is nothing whatever in the decision to confirm that the Commission ever exercised its discretion. And neither the FCC nor the AT&T briefs have identified one passage in the decision confirming that the Commission even considered the matter, much less reached a reflective judgment. In each of the precedents relied on by AT&T and the FCC, ^{11/} the Agency decision contained specific references which obviated any question whether the matter of suspension had been affirmatively evaluated. Here, however, there is total silence. In other contexts, the Supreme Court has held that even where the exercise of particular types of administrative discretion is not subject to court scrutiny, a failure to exercise such discretion is not beyond judicial redress. E.g., Accardi v. Shaughnessy, 347 U.S. 260 (1954); Yellin v. United States, 374 U.S. 109 (1963).

Perceiving the problem, AT&T attempts to establish that the Commission's silence is of no consequence here. It argues that the Commission "is not required to give reasons to justify its judgment that suspension or investigation is not warranted."

(AT&T Br. 40.) But that position again assumes that the Commission

^{11/} See, AT&T Br. 39, n. 77, 78; F.C.C. Br. 49, n. 42, 43.

has in fact made a "judgment that suspension or investigation is not warranted." It may well be that a Commission explanation of its determination not to suspend a tariff can properly be more abbreviated than might otherwise be required. But the fact remains that there must be at least some articulation from the agency. For a reviewing court must at least be satisfied that the Commission has met the Congressional directive to consider and decide. Moreover, to the extent the Commission has established by regulation processes for the filing and consideration of suspension requests (47 C.F.R. §1.733 et seq.), a court must also be satisfied that those processes have been observed.

Whatever may be the breadth of Commission discretion concerning suspension, there is a fundamental statutory obligation that it exercise that discretion. And whatever strictures there may be on judicial review of the substantive exercise of such discretion, those limitations do not inhibit a court's ability to redress a total failure to act. In this case, there is not one word in the Commission's decision which offers any reasonable confirmation that the Commission undertook any evaluation of CBEMA's suspension request. That omission is both judicially cognizable, ^{12/} and subject to appropriate remedial action.

^{12/} To the extent the FCC and AT&T briefs contend that the Commission below "decided" not to suspend the tariffs based on CBEMA's cross-subsidy arguments, the parties' later suggestion that CBEMA's proper course is to now file a complaint (AT&T Br. 40; FCC Br. 46) is clearly disingenuous. Since the standards for investigation under Sections 204, 205 and 208 of the Act are fundamentally the same, it is basically inconsistent for the Commission to claim here that its refusal to suspend and investigate below was proper, and at the same time to suggest that it would rule differently based on the same claims in a complaint context.

Even assuming arguendo that the Commission's silence is tantamount to an exercise of Commission discretion not to suspend, the cases cited by the FCC and AT&T represent no impenetrable bar to appropriate judicial action. In Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963), for example, the Supreme Court ruled that reviewing courts could not extend the suspension period designated by Congress by means of an injunction. To issue an injunction in a suspension case, it was said, would interfere with the Congressionally-established balance of rights between carriers and customers. Id. at 662-69. As the Supreme Court later made clear, however, the prohibition on injunctions and review of an ultimate suspension decision does not foreclose review for purposes of determining agency compliance with clear statutory commands, including the requirements of the Administrative Procedure Act.^{13/}

^{13/} See United States v. SCRAP, 412 U.S. 669 (1973), which affirmed the holding of Arrow, but added this proviso:

[Petitioners] urge that there is, or should be an exception to the general principle of non-reviewability of suspension decisions for those cases where the Commission has acted beyond its statutory authority, or in violation of a clear statutory command or a procedural requirement, a standard that the appellees view as broad enough to encompass alleged non-compliance with NEPA. . . . We express no view on any of these issues.

Id. at 688, n. 22. See also, Long Island Co. v. United States, 193 F. Supp. 795 (E.D.N.Y. 1961) (3 judge court).

Thus, courts have reviewed suspension decisions and other determinations left to agency discretion for compliance with the tariff filing procedures in the statute^{14/} and the rational-decisionmaking standards of due process.^{15/} Indeed it is precisely when the ultimate decision is left to agency discretion that the fairness of agency procedures becomes most critical. As the Court held in North American Van Lines v. ICC, 386 F. Supp. 665 (N.D. Ind. 1974),

It is not a reasonable construction of the statutory framework which governs the Commission's operations, or the Congressional policy underlying that framework,

^{14/} Trailways of New England, Inc. v. CAB, 412 F.2d 926 (1st Cir. 1969); Atlantic Seaboard Co. v. FPC, 201 F.2d 568 (4th Cir. 1953). See also, Episcopal Theological Seminary v. FPC, 269 F.2d 228 (D.C. Cir. 1959); Phillips Petroleum Co. v. FPC, 227 F.2d 470 (10th Cir. 1955).

^{15/} Naph-Sol Refining Co. v. United States, 269 F. Supp. 530 (W.D. Mich. 1967); Meadville Master Antenna, Inc. v. FCC, 443 F.2d 282 (3rd Cir. 1971); National Air Carrier Association v. CAB, 436 F.2d 185 (D.C. Cir. 1970).

to maintain that regardless of the substantialness or nature of such issues, the Commission can whenever it wishes and for no other reason impose such delay. 386 F. Supp. at 677. 16/

The haphazard and corner-cutting procedures followed below should similarly invalidate the Commission's decision.

B. The Commission's Refusal To Resolve The Material and Substantial Issue of Cross-Subsidy Was A Clear Abuse Of Discretion.

Underlying all of the Commission's other failings with regard to CBEMA's protests below was its refusal to confront the parties' contentions concerning cross-subsidy. In its initial brief herein(pp. 44-54), CBEMA pointed out that for more than a year it had argued that the tariff below presented serious questions of cross-subsidy. It had cited clear Commission policy and

16/ North American Van Lines involved a decision to withhold motor carrier authority to operate pending a related investigation into the carrier's general fitness. Actions regarding interim or conditioned authority to operate are left to agency discretion by the Motor Carrier Act, 49 U.S.C. §307(a), 312. See also, Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir. 1969), remanding approval of an agreement on port facilities for consideration of material issues raised by petitioner. The Court found significant the inadequate opportunities given by the agency for public participation (a 12 day notice and filing period for comments) and the agency's disregard of the important issues raised. 420 F.2d at 586-87.

precedent, and the issue had been joined directly by AT&T. Indeed, the Bureau Chief had stated early in the proceedings that CBEMA's "contentions raise substantive and complex issues which merit careful consideration by the Commission." (J.A. 625.) And in his decision, citing the Commission's "fears of possible unfair competition and cross-subsidy," the Bureau Chief found that the competitive Dataspeed 40/4 costs "are not clearly separable from monopoly and other regulated common carrier activities," and that "the material [AT&T has] submitted does not permit us to determine whether its development costs are subsidized." (J.A. 650.)

In its decision below, the Commission refused even to address the matter. Its sole statement on the subject was a summary declaration that "[t]he concerns which CBEMA raises in its petition address problems which are beyond the scope of Section 61.38." (J.A. 983.) That refusal to confront and resolve timely-raised material and substantial questions was, CBEMA has argued, a clear legal failing by the Commission.

The FCC and AT&T briefs do not here claim that the Commission did address the matter.^{17/} Nor does either party attempt even to argue that the Commission's views on the merits of CBEMA's cross-subsidy arguments can be derived from the decision as a whole. Rather, both simply defend the Commission's single sentence as adequate. (E.g., AT&T Br. 35; FCC Br. 43, 48.)

^{17/} In fact, AT&T characterizes the decision as having "ruled that [the Commission] did not have to resolve the cross-subsidy issue at this stage." (AT&T Br. 35. n. 68.)

As indicated earlier, the Commission's statement on its face is inconsistent with its earlier description of the purposes of Section 61.38. (See p. 13, supra.) But even if the Commission's declaration -- whatever it may mean -- was correct, the fact remains that basic questions concerning cross-subsidy had been raised. Even if those questions were "beyond the scope of Section 61.38," they were certainly not "beyond the scope" of declared Commission policies against cross-subsidy.^{18/} Nor "beyond the scope" of the requests for suspension or other relief. Nor "beyond the scope" of the Commission's statutory responsibility to explain its actions. It may well be that the Commission believed that its policies should not have been applied in the circumstances below, or that it simply disagreed with CBEMA's factual contentions. But if so, it had a minimum responsibility to so state. It could not properly choose to disregard the matter entirely. As it was recently noted by the District of Columbia Circuit: "[T]he opportunity to comment is meaningless unless the agency responds to significant points

^{18/} At two points in its brief, AT&T attempts to cure the Commission's failing by asserting that its economic data "showed a healthy profit from Dataspeed 40/4 . . . , [thus] negating any cross-subsidy." (AT&T Br. 34, 11, n. 21.) While CBEMA disagrees with AT&T's contention, it must concede that if the Commission had reached such a conclusion, CBEMA's position would be subject to serious challenge in this appeal. However, the Commission made no finding whatever in this regard. And AT&T's speculation at this juncture cannot properly be accepted as a substitute for an agency determination.

raised by the public." Home Box Office, Inc. v. FCC, ___ F.2d ___ (D.C. Cir.) (No. 75-1208, March 25, 1977), slip op. at 50 (footnote omitted). There was no such response here.

III. THE ASSERTED AVAILABILITY OF FURTHER COMPLAINT PROCEDURES NEITHER EXCUSES COMMISSION FAILURES BELOW NOR REPRESENTS EFFECTIVE RELIEF FOR THE PARTIES AFFECTED.

For more than a year, CBEMA argued its position before the Commission. In pleading after pleading, it detailed its factual and legal contentions concerning Section 61.38 of the Rules, rejection, suspension, cross-subsidy and the myriad infirmities of the Data-speed 40/4 tariff materials. On the scope of Section 61.38's requirements, the Commission provided no intelligible explanation of its views. On two of CBEMA's three alternative requests for relief, the decision was totally silent. And on the overall issue of cross-subsidy, the Commission affirmatively refused to respond.

As to Section 61.38, this court is told that the Rule is the Commission's alone, that CBEMA has no cognizable interest in its administration or enforcement, and that the court has no basis "for overturning the Commission's action even if there were some deficiency in the materials" AT&T submitted. (AT&T Br. 36.) Concerning suspension, we are urged that, regardless of the Commission's handling (or non-handling) of this matter, no redress is possible. And with regard to litigated issues of cross-subsidy, the Commission's stated reliance on AT&T materials it never in fact reviewed is to be tolerated as an acceptable approach to decision-making.

Lest all of the above appear heavy-handed, the court is assured that CBEMA is not without further recourse:

If it wishes to pursue its contentions, CBEMA may file a complaint with the Commission under Section 208 of the Act, 47 U.S.C. 208. If there appears to be any "reasonable ground" for investigating that complaint the Commission is bound to "investigate the matters complained of in such manner and by such means as it shall deem proper."

(FCC Br. 46.) Indeed, AT&T asserts further that, until CBEMA seeks "the same substantive relief -- an adjudication of the rates -- in a complaint proceeding," it should be barred from seeking review of the Commission's rulings thus far. (AT&T Br. 38; emphasis added.)

In CBEMA's view, the court should strongly reject the efforts by AT&T and the FCC to paper over the inadequacies of the processes below. Neither the FCC nor AT&T contend that CBEMA's efforts to obtain resolution of the questions it raised below were procedurally deficient. Nor are there claims that the issues advanced were inappropriate to the relief requested. Rather, the basic thrust of the FCC's position here is that, since CBEMA has a further procedural vehicle for re-raising the matters advanced below, the Commission's failure properly to have resolved those matters thus far warrants no redress. That approach, however, is not only indefensible as a matter of law, it represents an unacceptable view of the Commission's obligation to satisfy its various statutory responsibilities.

Moreover, the hollow nature of the complaint procedure now suggested should mainly recognized. A complaint by CBEMA at this point would imply a reiteration of the same matters which were before the Commission during the year-long proceedings below. It would be alleged again that the rates for the Dataspeed 40/4 items were unsupported and thus unjust and unreasonable as a prima facie matter, because certain major, known costs, cost factors and marketing judgments were unaccounted for. This claim is precisely the one CBEMA made below, while urging in every available way that the Commission obtain that information before concluding its review of the tariff.^{19/} Given the state of the public record, no more detailed complaint could be drawn, since the necessary information is solely in the hands of AT&T. To require a complaint as a remedy for half-hearted compliance with the statute's tariff review process is to indulge in a meaningless repetitive exercise.^{20/}

^{19/} It should be emphasized again that CBEMA's claims for relief pressed the information issue ahead of rejection or suspension of the tariff. See, J.A. 410-12; 704-05; 915-18. It remains our view that a reasonable judgment on the tariff cannot be made until these major cost items are disclosed for public review.

^{20/} In this regard, the Oscar Mayer & Co. v. United States opinion, 268 F. Supp. 977 (D. Wisc. 1967) relied on by the FCC and AT&T, is clearly distinguishable. The Orders of the ICC, quoted by the Court, showed that the agency did suspend the rates in question for six months and did undertake to address the arguments raised by protestants on their merits. 268 F. Supp. at 979-80, n. 3, 4. In addition, the tariffs in Oscar Mayer applied to ongoing services for which information was on file with the Commission and available to support its judgment. Here, the essence of the problem is a lack of information on key cost questions which undermines any claim of agency expertise or reasoned decisionmaking.

The circumstances would not be entirely the same, of course. For CBEMA's position in such a context, and its opportunity to be heard, would be far more attenuated. It would no longer have the opportunity to forestall a potentially unlawfully cross-subsidized tariff offering. For by its improper actions below, the Commission has already permitted the tariff to become effective. Moreover, because the tariffs are operative, the burden of persuading the Commission that an existing service should be terminated -- with the necessarily disruptive impact on customers -- is far greater. In CBEMA's view, if the Commission had intended such consequences -- if it had believed there were valid reasons why the public interest required CBEMA to pursue a more disadvantageous procedural course -- it had at least the obligation to explain why. It did not do so. And FCC counsel's ingenuity on appeal is no cure for that failing.

CONCLUSION

For the foregoing reasons, and for the reasons stated in CBEMA's initial brief herein, the Commission's decision below should be reversed with instructions to reject the Dataspeed 40/4 tariff. Alternatively, the court should direct the Commission to initiate an appropriate investigation of the tariff concerning the

matters CBEMA has raised, and simultaneously to take such actions as may be necessary to preserve the status quo as of the time of court action.

Respectfully submitted,

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June 2, 1977

CERTIFICATE OF SERVICE

I, Virginia S. Carson, hereby certify that a copy of the foregoing "Brief for Petitioner Computer and Business Equipment Manufacturers Association" was served this 14th day of June, 1977, by United States mail, postage prepaid, on the following:

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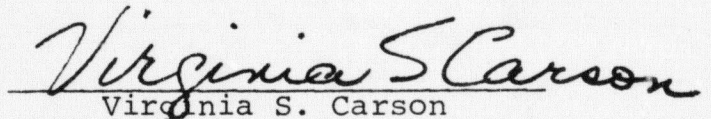
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